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No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM AHEARN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The May 7, 1958, opinion of the Court of Claims on the issue of liability (Pet. App. 21–26) is reported at 142 C. Cls. 309; the court's October 5, 1960, opinion on the question of the amount of recovery (Pet. App. 27–31) is not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on October 5, 1960. The petition for a writ of certiorari was filed on November 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners, civilian firefighters employed by the Department of the Navy, are entitled, in the circumstances of this case, to recover additional overtime and night differential compensation under the Federal Employees Pay Act of 1945.

STATUTES INVOLVED

The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901, provides in pertinent part:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates * * * [59 Stat. 296, 5 U.S.C. (1952 ed.) 911].
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate of 10 per centum in excess of his rate of basic compensation for duty between other hours * * * [59 Stat. 298, as amended, 5 U.S.C. (1952 ed.) 921 [1]].

STATEMENT

Petitioners, 111 civilian firefighters employed by the Department of the Navy at the Newport, R.I., Naval

[1] An amendment in 1954 did not affect the substance of either section. 68 Stat. 1109, 1110, 5 U.S.C. 911, 921.

Station, brought this suit to recover overtime and night differential pay under Sections 201 and 301 of the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. 911 and 921, for hours actually worked during time set aside for eating and sleeping.[2] The Government counterclaimed for overpayments alleged to have been made to petitioners. The trial was limited in the first instance, by stipulation of the parties, to the question of liability. In an opinion rendered on May 7, 1958, the Court of Claims held that petitioners were entitled to compensation for work actually performed during periods set aside for eating and sleeping (Pet. 23). It then conducted further proceedings, pursuant to its Rule 38(c), to determine the amount, if any, due petitioners after appropriate offsets (Pet. 26). Upon the conclusion of these proceedings, the court found (in its opinion of October 5, 1960) that amounts paid to petitioners by the Government for periods allotted to eating and sleeping exceeded the amounts which petitioners earned by reason of work actually performed by them during these periods. Accordingly, the court dismissed petitioners' claims (Pet. 27–31).[3]

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[2] Petitioners also claimed compensation for one-half hour of travel to and from their duty station, as discussed, *infra*, p. 7, fn. 6.

[3] The court also denied recovery by the United States on the balance of its counterclaims, holding that "the ends of justice" would be met by using the overpayments "to do no more than offset" petitioners' claims (Pet. 30–31). The Government has not sought review of this ruling.

The relevant facts are not in dispute and may be summarized as follows:

For the period covered by their claims, petitioners had a 72-hour workweek of three 24-hour tours, each commencing at 8:00 A.M. and terminating at 8:00 A.M. the next day. Throughout this period, they received pay on the basis of 16 hours of work and standby time out of each 24-hour tour, the remaining 8 hours being considered noncompensable eating and sleeping time. Thus, petitioners were paid for 48 hours of work and standby time each week, the first 40 hours of which were paid at regular rates, and the remaining 8 hours at overtime rates (Pet. 22).[4]

During the early part of the period covered by petitioners' claims, *i.e.*, until August 1951, 8 hours were allotted for sleeping between 10:00 P.M. and 6:00 A.M. Subsequently, however, 10 hours were alloted for sleeping between 8:00 P.M. and 6:00 A.M. In addition, approximately one hour was consumed in eating (Pet. 13–14 and 23).[5]

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[4] Prior to May 28, 1953, petitioners' tour was divided for pay purposes into 8 hours of worktime, 8 hours of standby time, and 8 hours for eating and sleeping, and they received overtime pay for certain types of work performed during eating and sleeping time. Subsequent to that date, petitioners were paid under the so-called "two-thirds rule" promulgated by the Civil Service Commission which provided for crediting two-thirds of each hour of the 24-hour tour as pay time, on the theory that the other one-third was used in sleeping and eating (Pet. 22–23).

[5] On page 6 of their petition, petitioners have inadvertently misstated as 10:00 P.M., rather than 8:00 P.M., the commencement of the sleeping time period after August 1951. See the correct statement in the petition at page 14 and also in the court's opinion (Pet. 23).

On various occasions petitioners performed duties during time set aside for sleeping. This suit was brought to recover pay for this work. Following trial on the question of their entitlement to this pay, the Court of Claims held, as already indicated:

> Where a substantial amount of time was spent on these duties during eating and sleeping time, such as the desk watch, for instance, plaintiffs are to be compensated therefor, but where the time spent was negligible, it is to be disregarded, under the *de minimis* rule.
>
> Against the total time spent on such duties during eating and sleeping time, defendant is entitled to an offset for the number of hours over eight in which plaintiffs were permitted to eat or sleep, but for which they have been paid, as well as for all overpayments of night differential pay [Pet. 24].

On the further proceedings to determine the amount (if any) of petitioners' recovery under this holding, the claims of petitioners Arthur E. St. Laurent and Frank F. McKay were selected as typical and representative. The court found that St. Laurent and McKay earned $6,238.63, and $7,091.10, respectively, for work performed during sleeping time. At the same time, however, they had been paid a total of $11,414.88 and $11,424.74, respectively, for periods allotted to eating and sleeping (Finding 19, Report of Commissioner, dated November 6, 1959). On these facts the court held (Pet. 29):

> In stating an account in all debtor-creditor relationships, of course, an overpayment on one transaction is to be offset against an underpay-

ment on another. So, the sum of all payments erroneously made for hours allotted to sleeping and eating must be subtracted from payments due for work performed during the time set apart for sleeping and eating. It turns out that the amounts erroneously paid for eating and sleeping time exceed the amounts due for work performed during sleeping and eating time, and, therefore, plaintiffs McKay and St. Laurent are not entitled to recover.

ARGUMENT

This is another in the series of cases decided by the Court of Claims involving overtime pay claimed by civilian firefighters employed by the Federal Government under pay legislation applicable to federal employees. *Conn* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757; *Gaetke* v. *United States*, 136 C. Cls. 756; *Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868; *Collins* v. *United States*, 141 C. Cls. 573; *Avary* v. *United States*, 141 C. Cls. 577; *Wright* v. *United States*, C. Cls. No. 232-57, decided January 14, 1959, certiorari denied, 359 U.S. 1001; *Armistrong* v. *United States*, C. Cls. No. 145-56, decided January 14, 1959, certiorari denied, 361 U.S. 825. The determination of the Court of Claims in this case is correct under these prior rulings, and since the decision basically turns upon the particular facts, as well as the principles applicable to pay claims against the Government, there is no question of importance in the general field of wage-and-hour legislation, nor conflict in decisions, presented.

1. It is to be noted at the outset that there is no issue respecting whether work actually performed by petitioners during time set aside for sleeping and eating is compensable. The court below held that it was compensable and the Government does not challenge that holding.

2. Petitioners' complaint is directed principally against the court's finding that petitioners had been overpaid, and its allowance of the overpayments as offsets against the amounts to which petitioners were entitled for work performed.[8]

(*a*) In this connection, petitioners first maintain that, in ascertaining whether they were properly accorded sleeping and resting time, the Court of Claims indulges in an "indiscriminate 'averaging' " of petitioners' sleeping time over a period of several years, so that hours worked during sleeping time in one period were balanced against "a surplus" of sleeping time during a different and remote period (see Pet. 11, 12 and 13). There is no merit to this contention. On the contrary, the court calculated the pay to which the employees would be entitled, without any offsets or 'balancing', and in doing so accorded petitioners the full measure of their claimed rights.

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[8] Petitioners also claimed compensation for approximately one-half hour of travel by boat both before and after each 24-hour tour when they were assigned to one or the other of the two fire stations located on islands off-shore from the base proper (Pet. 9 and 22). Citing *Bulot, et al.* v. *Freeport Sulphur Co., Inc.*, 45 F. Supp. 380 (E.D. La.), the Court of Claims held that on the facts the "time spent in this travel is no more compensable than time spent by any employee in going from his home to his work" (Pet. 25-26).

The court first computed—on the basis of evidence showing actual work performed, by the petitioners selected as illustrative (McKay and St. Laurent), each day, at each duty station, during periods set aside for sleeping—the total hours of overtime work. It then computed the sums to which petitioners were entitled for such work on the basis of the night differential and overtime pay rates applicable at the time of the particular tours of duty. It was only then, in coming to the Government's claim of offset, that the court found separately the amounts improperly paid petitioners during such periods for eating and sleeping time and for excess night differential pay (see Finding 19, Report of Commissioner, dated November 6, 1959). These latter amounts were found to exceed the sums which petitioners had earned—but the initial computation of petitioner's claims was unaffected by the offsets asserted by the Government; the calculation of petitioner's claim for time they should have been (but were not) paid was made just as if no offsets were alleged.

(*b*) The determination that, on balance, petitioners had been overpaid was based upon the fact that, until August 1951, petitioners had 8 hours of sleeping time and, in addition, used one hour for eating, or a total of 9 hours out of 24 for eating and sleeping; that subsequently petitioners had 10 hours for sleeping and an additional hour was spent in eating, or a total of 11 hours out of 24 for eating and sleeping;[7] and that

[7] Petitioners complain of this change from 8 hours of sleeping time to 10 hours, but it should be noted that (a) this change

during the entire period petitioners were paid for 16 hours out of each 24. To this fact situation, the court applied the rule consistently followed by it that, under the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901, *et seq.*, an employee is not to be compensated for time reserved for sleeping and eating merely because such time is subject to possible interruptions, but is to be compensated for any substantial periods within that reserved time in which he actually performs labor for the Government. See *Farley* v. *United States*, 131 C. Cls. 776; *England* v. *United States*, 133 C. Cls. 768; *Gaetke* v. *United States, supra*; *Sawyer* v. *United States, supra*; *Collins* v. *United States, supra*; *Avary* v. *United States, supra*; *Wright* v. *United States, supra*; *Armstrong* v. *United States, supra*. Under those criteria, petitioners turned out to have been overpaid.

Whatever may be the rule for private employment, it is clear that federal employees cannot object to recoupment of sums of money improperly paid to them during a pay period, or deny the Government the

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was not merely theoretical or formal since, subsequent to the change, the firefighters were permitted to occupy their beds after 8 p.m., instead of only after 10 p.m. as formerly, and (b) the court below stated that while the record "does not show why this additional time was allowed, * * * it is plausible to suppose, in the light of the facts of this case, that it was done to permit the employees to 'catch up on their sleep' where it had been interrupted on previous nights by calls to active duty" (Pet. 28-29).

right to offset overpayments against underpayments for which the employees are suing. For, unlike the private employer (who is not normally disabled by law from paying more than the statutory minimum wage), federal officials cannot pay more than the amounts permitted by the pay legislation enacted by Congress. Such payments are illegal, and may be recouped under the general rule that payments made unlawfully or through mistake of law may be recovered by the United States (*United States* v. *Wurts*, 303 U.S. 414, 415–416; *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190, 212). Accordingly, petitioners cannot complain of the allowance by the Court of Claims of the offsets for payments improperly made to them under the Federal Employees Pay Act, *supra*, as consistently interpreted by the court below.

3. The general rule as to overtime pay for federal firefighters which the Court of Claims has been following is an adoption and application of the general principles enunciated by this Court in *Armour & Co.* v. *Wantock*, 323 U.S. 126; and *Skidmore* v. *Swift & Co.*, 323 U.S. 134. In these two companion cases, the Court considered whether time spent on an employer's premises by firefighters who are subject to call, but who are not engaged in the performance of actual work, constitutes working time for the purposes of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201. In *Armour*, the district court had held that firefighters employed by a private company were not entitled to compensation for time

normally set aside for eating and sleeping, but were entitled to be paid for the remaining hours on call during which no actual work was performed. Both the Court of Appeals and this Court affirmed that portion of the judgment which was adverse to the employer; the employees, who had originally contended that all time was compensable, had taken no appeal. While the Court thus was not concerned specifically with the question of whether eating and sleeping time is compensable, it nevertheless pointed out (323 U.S. at 133):

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

In *Skidmore*, the Court reversed a holding that there was no entitlement to pay under the Fair Labor Standards Act for on-call time during which no actual work was performed. The Court held that no principle of law precluded a determination that waiting time was working time and that "[w]hether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." 323 U.S. at 136–37, 140. With respect to firefighters, the Court noted, as "entitled to respect" (p. 140), the conclusion of the Administrator of the Wage and Hour Division of the

Department of Labor, expressed in an *amicus curiae* brief in that case, that the appropriate standard called for "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time * * *" (p. 139).

Since the *Armour* and *Skidmore* decisions, this Court has consistently refused to review decisions dealing with the compensability of eating and sleeping time under varying factual situations. *E.g., General Electric Co.* v. *Porter,* 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter,* 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813, 817; *Rokey* v. *Day & Zimmerman,* 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Armstrong* v. *United States, supra*; *Wright* v. *United States, supra*; *Sawyer* v. *United States, supra*; *Conn* v. *United States, supra.** No more reason exists for review in this case.

4. Petitioners attempt in several ways to treat this case as if it arose under the Fair Labor Standards Act, rather than the separate pay legislation for fed-

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*The most recent petition for a writ of certiorari in a case where the Court of Claims had applied the principles set forth in the *Armour* and *Skidmore* decisions was in *Baca* v. *United States,* No. 405, this Term. The petition was denied on November 14, 1960. However, the question in the *Baca* case was not, as it is here, the compensability of eating and sleeping time. Rather, that case concerned civilian bus drivers and time spent by them between split working periods; and that decision, likewise, turned in our view upon the particular facts and circumstances there existing.

eral employees, and as if it posed important issues under the former statute. But the United States is not governed by the Fair Labor Standards Act (see Section 3, 29 U.S.C. 203(d)), and administrative rulings under that Act are not automatically applicable to federal employees. Moreover, particularly with respect to the problem in this case of the offsets allowed by the Court of Claims, the United States as employer is in a significantly different position from private employers, as we have pointed out, *supra*, pp. 9–10.[9]

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[9] It should also be pointed out that in the Act of September 1, 1954, 68 Stat. 1111, 5 U.S.C. 926, Congress made provision, in so-called "premium pay" legislation, for a special method of compensating federal employees in the position of these firefighters, under which a fixed percentage is added to their basic annual compensation in lieu of time-and-one-half pay for overtime work. Such legislation applies, in those departments and agencies which have adopted such method (as has the Department of the Navy) to all future employees and to such present employees as will not thereby suffer a decrease in their existing aggregate rate of compensation (see Section 208(b) of the Act). While this legislation had only minimal direct applicability in this case, principally because of the time periods involved, it nevertheless emphasizes the differences in legislation governing federal employees and that governing private employees.

Moreover, petitioners erroneously claim that they were afforded less than five hours of continuous sleep. On the contrary, the Trial Commissioner found in his Report of November 6, 1959 (Finding 20) that "There were a few instances during the nine-year period of performance reviewed when less than 5 hours of continuous sleep were afforded McKay and Laurent during a tour of duty. In a few instances the interruption for desk-watch duty was to accommodate or exchange services with another firefighter."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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Petitioners

v.

United States of America,

Respondent

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's argument reposes on three premises, namely, that the instant case presents no novel problem; that the Court below did not resort to "indiscriminate averaging" of oping time; and that the Fair Labor Standards Act is not applicable to the problem at hand. Petitioners' reply is that these are either factually incorrect or totally inadequate to support the argument based thereon.

1. This case differs essentially and materially from each and all of the firefighter cases cited on page 6 of Respondent's Brief. In all those cases the only issue involved was one of fact as to whether the plaintiffs had performed compensable overtime. In the present case the Court has resolved that issue in favor of Petitioners, establishing that substantial overtime has been performed

by them, and that such overtime is compensable. The sole question in this case is whether the respondent has discharged its obligation to pay for such overtime on specifically identified tours of duty by "allowing" time for sleep during different and remote tours of duty in excess of that reasonably usable[1] by petitioners.

As was pointed out in the original petition for certiorari, the 24 hour period of work was divided into three parts 8 hours of work, 8 hours of standby time and 8 hours for sleeping. The 8 hours for sleeping was set by a Navy regulation. What the Commanding Officer of the Newport Naval Station did was to take 2 hours of either standby or work time and make it sleeping time by increasing the sleeping time from 8 to 10 hours. This is a direct violation of the Navy regulation. Under the decisions of the Court of Claims in this case the government is entitled to a setoff of pay for 2 hours every working period except where that 2 hour period is setoff by 2 hours of work during the sleeping period. If no work is performed during the sleeping period, the government is entitled to deduct from each of the petitioner's pay the compensation covering this 2 hours. If it is legally permissible to extend the sleeping time to 10 hours, by the same method it may be extended 12 hours, thus the government would have a setoff for 4 hours pay except where they had worked 4 hours during the sleeping period. There was no authority under the regulation of the Navy

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[1] Significantly, in a footnote to its Finding 19, Slip Opinion, October 5, 1960, the Court states the following: "There is also for consideration the fact that, although plaintiffs were permitted to sleep from 8 to 10 p.m. for a period of time, i.e., beds were available, the record does not establish that any firefighter got more than 8 hours' sleep during any 24-hour period, and it was often less than 8 hours. See finding 9 of the Court's opinion of May 7, 1958, which states: 'They were able to get a maximum of 8 hours sleep or rest combined each night if there was nothing else to do. Often the actual amount of sleep would be from 5 to 7 hours or less.'"

Department to extend the sleeping period more than 8 hours and in truth and fact at no time did any of the petitioners get any more than 8 hours of sleep, and many times did not get that much.

2. Respondent completely ignores the very vital legal proposition argued in pages 12-15 of Petitioners' Brief concerning the absolute compensability of all hours comprised within petitioners' 24-hour tour of duty, with the sole exception of 8 hours devoted to sleeping and eating, as true standby time, under the Court's Findings. Instead, it purports to refute petitioners' statement that the Court of Claims, in arriving at its decision adverse to petitioners, indulged in indiscriminate averaging of petitioners' sleeping time over a period of several years. At most, this argument is a quibbling over terminology. Whether "averaging" is the term which best describes what the Court of Claims did is beside the point. The facts of the matter are accurately set forth in the identification of the ultimate question in the preceding paragraph.

In computing the setoff against the petitioners, the Court below gave credit for such setoff 2 hours each night for the sleeping period and 1 hour during the eating period. Thus we will say that for three shifts of 24 hours each in which no work was performed during the sleeping period the government would have a setoff under the ruling of the Court below for a period of 9 hours, and if an extension of the sleeping time was made it could easily reach the ridiculous situation so that the petitioners would be working without any pay whatsoever.

3. Respondent relies upon the fact that the government, unlike a private employer, would not legally forego the assertion of a setoff in this case. As an abstract proposition this is readily conceded. Petitioners, also concede that neither the Fair Labor Standards Act nor the administrative regulations promulgated thereunder

are *automatically* applicable to federal employees but, having made these concessions, the question still remains for decision whether there was a factual and legal basis for asserting a setoff in the present case and, whether, legal principles evolved through the practical application of the Fair Labor Standards Act should not be applied, as a *source of law* in the circumstances of the present case. A Navy Civilian Personnel Regulation cited at page 17 of Petitioners' Brief seems to require such application. The decisions and regulations of the Department of Labor under the Fair Labor Standards Act are cited only as precedents the same as decisions by Courts where the same principles are involved. It is believed that the decisions and the regulations under the Fair Labor Standards Act are applicable to this case. They are dealing with the same problems involved in this action, and the regulations and decisions have from time to time been approved by the Congress of the United States by the enactment of legislation. The government should be just as fair in dealing with its own employees as it requires private industry to deal with their employees. The decisions and regulations therefore furnish proper precedent for the consideration of this action. Additional reasons for such legal accommodation are stated in Petitioners' principal Brief. The Court of Claims itself considered decisions of this Court under the Fair Labor Standards Act to be fully applicable in the consideration of what constitutes hours of employment pursuant to the Federal Employees Pay Act of 1945. Necessity suggests such a course for, in the absence of such guidance, some alternative criteria, administrative or judicial, are indispensable for the delineation of zones where the encroachment upon the time of a federal civilian employee pursuant to official duty, without compensation therefor, ceases to be permissible.

The premium pay referred to in the note on page 13 of the Respondent's brief has no application to the petitioners McKay and St. Laurent. Their pay has long since been frozen by order of the Comptroller General and they do not come within the provisions of the statute relative to such premium pay.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

This Court on January 9, 1961 denied the petitioner's petition for a writ of certiorari to the United States Court of Claims. This petition for rehearing is filed in accordance with Rule 58 of this Court within the 25 days after January 9, 1961 as required under that rule. The Reply Brief of the petitioners to the brief of the respondents was filed on Friday, January 6, 1961 while a petition for certiorari was denied on Monday, January 9, 1961. It is therefore believed that the Reply Brief of the petitioners was not considered by this honorable Court prior to its decision to deny the petition for writ of certiorari. This Reply Brief, which it is hoped the Court will consider in connection with this Petition for Rehearing, brought out what was believed to be misstatements of facts contained in the Respondent's brief. Because of

the great importance of this case to firefighters employed by the United States government, the facts and the law applicable should merit reconsideration.

At the very outset of the Respondent's brief on page 6 under the heading ARGUMENT, the statement is made without reservation that this case involves the same questions raised by civilian firefighters in the cases cited. This is misleading. The cases cited by the Respondent relate to the question of whether the firefighters could recover for the entire 24 hour period of duty. In this case the Court of Claims definitely held that the petitioners were entitled to recover for the work performed during the sleeping period. What the petitioners complain about is the so-called setoff allowed to the government. This setoff arises through the fact that the Commanding Officer of the Newport Naval Station increased the time in which to sleep from eight to ten hours (See page 4 of the Respondent's brief). The setoff arises from what the petitioners assert to be an illegal act of the Commanding Officer. Prior to May 28, 1953 the time for sleeping was from 10 P.M. to 6 A.M. The government had no setoff for this period of time as far as the sleeping period was concerned.

In the footnote of Respondent's brief on page 4, the true fact comes out. Prior to May 28, 1953 petitioners' time was divided into three equal parts 8 hours of work, 8 hours of standby time, and 8 hours for sleep and eating. Thereafter they were under the so-called two-thirds rule, being paid for 16 hours for work, and standby time, but the theory was that they would as before have 8 hours for sleeping. Counsel is quoting from the Respondent's brief. The Respondent's brief in this connection practically concedes that there is no legal setoff against the petitioners.

Now if the theory is that they would have only 8 hours for sleep and eating purposes, what authority did the Commanding Officer of the Newport Naval Station have to increase the sleeping time for 2 hours? The answer is that he had no such authority. In order to increase the sleeping period, he had to take either 2 hours from the work period of 8 hours, or from the 8 hours of standby time, both of which were compensable.

As the situation now stands and under the decision of the Court of Claims, every working day of 24 hours in which the firefighters are now employed and in which for some reason do not perform any duties during the sleeping period the government is entitled to deduct from their pay the amount covering the two hours by which the sleeping time was illegally extended.

These men are confined to the fire house during the entire 24 hour period except when outside on official duty. They cannot leave the fire house without permission even to go across the street. Furthermore, if it is legally possible to extend the time for sleeping by two hours, it may be extended for any number of hours.

Practically the sole question involved in this case is whether the Commanding Officer could by a simple order extend the sleeping time. If he extended it by two hours, he could extend it four hours, and thus each firefighter would be compelled to work four hours during his sleeping period to offset the extra time allowed for sleeping. There is no justification legally or otherwise for the setoff allowed the government in this case.

This petition for rehearing should be granted, and upon consideration of this case, the judgment of the Court of Claims should be reversed and the plaintiffs should recover what is justly due them.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith, and not for the purposes of delay. That the petition for rehearing is restricted on the grounds specified in this petition for rehearing.

CLAUDE L. DAWSON
of Counsel for the Petitioners.